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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 900

CONSTANTINE GUINESS, *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Carl L. Shipley and Thomas A. Ziebarth on behalf of Constantine Guiness pray that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in the above captioned case on February 3, 1960, dismissing plaintiff's petition.

OPINION BELOW

The opinion of the court below is reported at page 1a of the Appendix hereto.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the United States Court of Claims erred in holding that that petitioner, an officer of the Military Sea Transportation Service, deserted his ship as the term "desertion" is defined in that agency's own regulations.

STATUTE AND REGULATION INVOLVED

46 U.S.C. 701 provides in pertinent part:

> "Whenever any seaman who has been lawfully engaged or any apprentice to the sea service commits any of the following offenses, he shall be punished as follows: *First:* For desertion, by forfeiture of all or any part of the clothes or effects he leaves on board and of all or any part of the wages or emoluments which he has then earned * * *."

The applicable portion of the *Civilian Marine Personnel Instruction No. 45,* Section 6, dated March 21, 1952, hereinafter referred to as the *Regulation,* provides:

> "6-1. DEFINITION.—Desertion is defined to be the quitting of a ship and her services without leave and with the intent not again to return to the ship's duties. Accordingly, desertion must necessarily be distinguished from absence without leave. Therefore, whenever a seaman leaves a ship without permission and subsequently returns thereto, such subsequent return creates a presumption which defeats the intent 'not again to return to the ship's duties.' * * * Employees may be charged with desertion, however, when they perma-

nently leave the ship in continental U.S. ports, other than the home port, or in any other port in violation of the Articles of Employment or Instructions related thereto.

6-2. ESTABLISHMENT OF INTENT REQUIRED.—In order that the charge of desertion may be warranted, it is mandatory that the intent to desert be established by a preponderance of the evidence. Sufficient evidence to support the charge is dependent upon each particular case. For example:

a. It has been held that where a seaman leaves any of his clothes or equipment aboard the ship, such fact may defeat a charge of desertion.

b. It has also been held that cruel treatment or just fear for personal safety is a valid excuse which would defeat a charge of desertion.

c. Where a seaman left the ship by permission, got drunk, and was imprisoned, which prevented his return to his ship, but there was nothing to indicate that he had any intention not to return, such seaman was held not guilty of desertion.

d. Where a seaman went ashore without intention to desert and while on shore was detained as a witness by civil authorities, and in the meantime his ship left the port, it was held that this did not constitute desertion.

The foregoing constitute only a few of the many cases on the subject of desertion of seamen. See Title 46, USC, Section 701 for other cases on the subject."

STATEMENT OF THE CASE

Petitioner is a veteran preference eligible with Civil Service status, who brought suit in the court below to recover back pay and allowances including accrued leave, from January 16, 1956, on the grounds that he

was wrongfully discharged from his position in the Military Sea Transportation Service. Petitioner was dismissed for allegedly deserting his ship, the USNS SHORT SPLICE, on January 20, 1956, while it was docked at the U. S. Naval Operating Base, Bermuda.

Both the Military Sea Transportation Service (MSTS) and the Civil Service Commission, to which petitioner appealed, sustained his dismissal.

The facts surrounding the alleged desertion are as follows:

1. On January 19, 1956, when petitioner was serving as First Engineer on board the USNS SHORT SPLICE, the ship was docked at the U. S. Naval Operating Base at Bermuda. During off duty hours petitioner went ashore to have a few drinks at the Chief Petty Officers' Club, where he was assaulted by Benbow, a subordinate under petitioner's immediate command, because Benbow was critical of the way petitioner had treated another of his subordinates, one Livingston, who was also under petitioner's command and a shipmate of Benbow.

2. After Benbow assaulted his superior officer in the presence of other subordinate crew members, he ran away, with the ultimate purpose of returning to the ship.

3. Petitioner returned to his ship and attempted to get Benbow to apologize in the presence of the crew members in whose presence he had assaulted his superior officer in order to restore discipline over his subordinates.

4. Second Mate Smiechowski, a deck officer of the ship, held petitioner's arms while Benbow again assaulted petitioner in the presence of other crew member's inflicting rather serious injuries.

5. Whereupon, petitioner, injured and unsupported by other officers on the ship took refuge ashore in a hotel.

6. After checking into his hotel room, petitioner telephoned the Chief Engineer aboard the ship and told him of the Captain's wish to have the ballast tanks filled in the morning. He also stated he would not sail on a ship where a wiper could punch a First Engineer.

7. Petitioner awoke the next morning, obtained medical care at a Bermuda hospital and learned that his ship had sailed without him.

8. Petitioner at once took a plane to New York, the ship's home port, reported to his superior civilian officer at Navy headquarters and attempted to rejoin his ship at its first port of call, but was denied permission to do so.

9. At the time petitioner left the ship, many of his personal belongings were left behind including his Engineer's license.

ARGUMENT

To prove desertion, the *Regulation, supra, Sec. 6-1* requires a showing that the person accused quit the ship and her services:

> "* * * without leave and with the intent not again to return to the ship's duties * * *."

Sec. 6-2 of the *Regulation* establishes a mandatory evidentiary rule that "* * * the intent to desert be established by a preponderance of the evidence * * *." Petitioner submits that the preponderance of evidence does not support the proposition that petitioner intended to desert his ship. A preponderance of evidence is the superior weight of substantial evidence, not a mere fragment or scintilla. *N.L.R.B.* v. *Falk Corporation*, 102 F. 2d 383.

Personal Gear Left Aboard

"It has been held that where a seaman leaves any of his clothes or equipment aboard the ship, such fact may defeat a charge of desertion." *Regulation, supra, Sec. 6-2-a.* Petitioner left many of his personal belongings aboard the ship, including his Engineer's license. He also borrowed a piece of luggage from a shipmate, establishing a further inference of intent to return.

Just Fear for Personal Safety

When petitioner returned aboard his ship, his fellow officer, the second mate, instead of assisting him in the maintenance of good order and discipline where a subordinate was involved, took the part of the subordinate and held petitioner while he was struck and injured by the assaulting subordinate.

The *Regulation, supra, Section 6-2-b.* states further:

> "It has also been held that a cruel treatment or just fear for personal safety is a valid excuse which would defeat a charge of desertion."

Petitioner submits that when a wiper in the Engineering Department aboard a ship can enlist the aid of the ship's second mate in beating the first assistant engineer, that he was justly in fear for his personal safety. He was justified in leaving the ship until or unless the disciplinary breach had been mended and his proper position of authority reestablished, and was entitled to the cooperation of his fellow officers, to this end. Neither desertion nor absence without leave can occur when there is reasonable or justifiable cause for leaving a ship. Any other rule would be barbaric and out of step with the general policy of the law.

In re Scott's Petition, 143 F. Supp. 175, (N.D. Calif. 1956)
Barfknecht v. *Shepard S.S. Co.* 99 P. 2d 387 (Wash. 1939)
The Alanzo, (D.C. Me. 1865) Fed. Cas. No. 258
The Gem, (D.C. Mass. 1867) Fed. Cas. No. 5304
City of Mobile, 116 F. 212 (S.D. Ala. 1902)
McKinnon v. *Reed*, 99 F. 624 (D.C. Pa. 1889)

Continuing Exercise of Responsibility

After petitioner had left the ship, he called the Chief Engineer and relayed the Captain's instructions regarding the filling of the ballast tanks. He also informed his superior of his reasons for leaving, viz. fear for his personal safety and need of medical aid. This telephone call shows petitioner's continuing sense of responsibility toward his duties aboard the ship, even *after* he had allegedly deserted. Furthermore, it corroborates his contention that he was fearful for his personal safety.

Timely Effort to Return

In the very definition of desertion, the subsequent return of a seaman to his ship, " * * * creates a presumption which defeats the intent 'not again to return to the ship's duties' * * *." *Regulation, supra, Sec. 6-1.*

Petitioner could not return directly to his ship since it was on the high seas. However, he reported immediately to the appropriate authorities in the ship's home port of New York and requested permission to rejoin his ship in Norfolk. This request was denied.

The "animo non revertendi" prerequisite to prove desertion has not been established by any evidence, much less a preponderance. *The John Martin*, 13 Fed.

Cas. No. 357, *Hayes* v. *Wickwire*, 11 Fed. Cas. No. 6262. The court below relied almost entirely upon the events of the night of January 19th, and the early morning of January 20th to support its decision that petitioner intended "not to return to the ship's services." However, petitioner's statements and actions of that night must be weighed against the total record including his actions after he had had an opportunity to sleep on his hasty actions and receive needed medical attention for the beating to which he had been subjected. Indeed, if he had been drinking, he may have been incapable of entertaining a premeditated and deliberate purpose to leave his ship permanently. When viewed in the larger perspective, it is clear that petitioner had no permanent intent to desert.

On the basis of all the evidence during this period, petitioner respectfully submits that his leaving the ship under the circumstances he did, viz. fight, fear for personal safety, clothing left aboard, call to Engineer, and timely effort to return, proves he did not desert his ship as that term, is defined in the employing agency's own rules. At most, he was absent without leave. However, he was neither charged with nor punished for that offense. Thus, his dismissal was procedurally defective and unlawful, under Section 14 of the Veterans' Preference Act, 5 U.S.C. 863; *McGuire* v. *U. S.* Court of Claims, No. 383-54, decided February 11, 1959. Instead, the employing agency undertook to charge him with desertion and impose upon him the severe penalty of dismissal and forfeiture of pay and personal belongings. In *The Cripple Creek*, 52 F. Supp. 710, the court found certain seamen guilty of absence without leave, but not guilty of desertion:

> "To constitute the offense of desertion * * * it is essential that there must be an intention not to return, *animo non revertendi* * * * It seems to me from the careful examination of the record that it cannot be stated that these libelants deserted the vessel "Cripple Creek" in the sense that they intended to *cut off completely all relationship with the vessel.* However, I feel certain they were *absent without leave* * * *". (Emphasis supplied).

As set forth in the *McGuire* case, supra, plaintiff cannot be lawfully discharged under Sec. 14 of the Veterans' Preference Act for desertion, if the evidence only supports a charge of absent without leave.

CONCLUSION

Wherefore, the premises considered, petitioner prays that his petition for a writ of certiorari be granted.

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May 2, 1960

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 438-58

(Decided February 3, 1960).

CONSTANTINE GUINESS

v.

THE UNITED STATES

Mr. Carl L. Shipley for plaintiff. *Messrs. Shipley, Akerman & Pickett*, and *Samuel Resincoff* were on the brief.

Mr. Earl L. Huntington, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for defendant. *Mr. George S. Leonard* was on the brief.

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

WHITAKER, *Judge*, delivered the opinion of the court:

This case is before the court on defendant's motion and plaintiff's cross-motion for summary judgment.

On May 31, 1956, plaintiff, a veteran preference eligible in the classified civil service, was discharged from his position in the Military Sea Transportation Service, with forfeiture of all pay and allowances, including accrued leave from January 16, 1956.[1] The charge against plaintiff was that he

[1] This was in accordance with R.S. § 4596, 30 Stat. 760 (1898), as amended, 53 Stat. 1147 (1939), 46 U.S.C. § 701 (1952), which provides, in pertinent part:

> Whenever any seaman who has been lawfully engaged or any apprentice to the sea service commits any of the following offenses, he shall be punished as follows:
>
> First. For desertion, by forfeiture of all . . . any part of the clothes or effects he leaves on board and of all or any part of the wages or emoluments which he has then earned.

had deserted his ship, the USNS Short Splice on January 20, 1956, while it was docked at the United States Naval Operating Base, Bermuda. After a review on the merits, both the Military Sea Transportation Service (MSTS) and the Civil Service Commission, to which plaintiff appealed, sustained the charge.

Plaintiff now sues in this court for the salary he would have received if he had not been discharged, claiming that the actions of the employing agency and the Civil Service Commission were arbitrary and capricious or their decisions were so erroneous as to imply bad faith, since, it is alleged, there was no substantial evidence before either of them to sustain the charge of desertion.

The record before this court contains all the evidence before the Civil Service Commission and the Military Sea Transportation Service. The relevant facts of the case may be briefly stated as follows: Plaintiff was employed as the First Assistant Engineer on the USNS Short Splice. On the evening of January 19, 1956, while in the Chief Petty Officers' Club at the Bermuda Naval Station, plaintiff and one Benbow who was a wiper on the Short Splice and one of plaintiff's subordinate employees, got into an altercation, during which Benbow hit plaintiff on the side of the head. Immediately thereafter, Benbow left the Club. Plaintiff followed after him, but was unable to overtake him. Plaintiff then returned to the ship.

When Benbow returned to the ship about 1:00 a.m. plaintiff sought him out and found him in his room aboard the Short Splice. A second disagreement took place, during which Benbow struck plaintiff in the face, while plaintiff's arms were being held by the Second Mate and others in an attempt to stop the fight. Eventually, plaintiff was pushed and crowded to his cabin by the Chief Mate and the Second Mate.

In his affidavit made on January 23, 1956 plaintiff reports the following colloquy which took place at this time between him and the First and Second Mates:

> • • • I told them both that if they think they can run the Engine Department I would pack my gear and get off. The Second Mate told me he did not care what I did, but he would not let me go to the Wiper's room. I told them at least three times, but they would not let me alone; consequently I started packing. • • • The mates were so sure I would not do such a foolish thing that no one tried to stop me from leaving. • • •

Duprey, the Chief Mate and a friend of plaintiff's testified concerning this incident:

> I told Mr. Guiness to calm down & stop making a fool of himself. He said that he didn't care & was getting off the ship. I told him that he would be a deserter & make it bad for everyone. He said that he wasn't taking orders from any mates. He asked for a suitcase. With the idea that the gesture might calm him down, I let him have one of my suitcases. He packed his gear. I told him to sleep on his decision before leaving the ship. I left him in his room at about 0200 to let him think it out. All told, I was trying to talk him into acting sensibly from about 2330 to 0200.

After leaving the ship, plaintiff went to a nearby hotel. After getting a room, he telephoned the Chief Engineer. Plaintiff gives the following report of this conversation in his affidavit of January 23:

> I called the Chief Engineer to inform him that the captain wanted the ballast tanks filled in the morning and that I did not want to sail on a ship where a Wiper can punch a First Assistant Engineer. He told me I would get into trouble, that I was acting too hastily, and the least I should do is remain aboard until the ship arrived in New York.

The Chief Engineer relates this conversation as follows:

> 1. On 20 January 1956 at about 0230 1st Asst. Engr. C. Guiness telephoned me on board ship. I was just returning to the ship from liberty.
>
> 2. Mr. Guiness informed me that the Master wanted the ballast pumped in in the morning. He told me that he was in some fight with the Wiper & had gotten a black eye. He said, "I've got my bags with me & am staying up here at the hotel." He said, "I'm not coming back." I said, "After 14 years of service, you'd be a fool to quit that way." I talked to him for about 20 minutes telling him over and over again to come back to the ship. He refused to come back. He said that he had already gotten his reservation on the 0900 plane to N. Y. I told him that he could get his money back & sail with the ship.

The next morning, January 20, 1956, plaintiff awoke at 9:00 o'clock and, after seeking medical care for his swollen eye, took an afternoon plane to New York. The Short Splice sailed that morning at 10:00 o'clock for Norfolk. Soon after his arrival in New York plaintiff reported the foregoing events to officials at the Military Sea Transportation Service headquarters in New York.

On February 3, 1956, he was charged with desertion, and later, on May 31, 1956, he was dismissed from the service and his pay and personal effects left on board were forfeited.

In plaintiff's contract of employment he agreed to be bound by the Civilian Marine Personnel Instructions and all duly authorized regulations. Section 6 of Civilian Marine Personnel Instruction No. 45, which is the regulation of the employing agency on which the charges were based, defines desertion as "the quitting of a ship and her services without leave and with the intent not again to return to the ship's duties." Paragraph 6-2 further requires that "the intent to desert be established by a preponderance of the evidence." Plaintiff bases his argument solely on the ground

that the evidence did not establish the necessary intent to sustain the charge of desertion. He says this is true because there is evidence in the record that when he left the ship he left certain items of clothing behind, and, secondly, that as soon as possible after his arrival in New York he reported to the agency headquarters, related what had taken place, and asked their advice on what to do. However, irrespective of this, we have in evidence plaintiff's own affidavit and testimony that he told the Chief Engineer that he was quitting the ship, and his statement to the First and Second Mates that he was leaving the ship, and the further fact that he packed a suitcase with at least some of his personal effects, and left the ship with them. His affidavit is corroborated and elaborated by the First Mate and Chief Engineer. We also have the further fact that when plaintiff awoke the next morning he made no effort to rejoin his ship, although it did not leave until an hour later.

Plaintiff says when he arrived in New York he asked permission to rejoin his ship in Norfolk, but none of the five officials of the service in New York have any recollection of such a request having been made.

In the light of all this evidence, it is clear that the employing agency was not arbitrary or capricious in determining that plainff did have the intent to desert his ship.

We call attention to the fact that plaintiff was not charged with deserting the service, but with deserting his ship. We quote a passage from the opinion of the Supreme Court in *Robertson* v. *Baldwin*, 165 U.S. 275, 282-283:

> From the earliest historical period the contract of the sailor has been treated as an exceptional one, and involving, to a certain extent, the surrender of his personal liberty during the life of the contract. Indeed, the business of navigation could scarcely be carried on without some guaranty, beyond the ordinary civil remedies upon contract, that the sailor will not desert the ship at a critical moment, or leave her at some place where seamen are impossible to be obtained—as

Molloy forcibly expresses it, "to rot in her neglected brine." Such desertion might involve a long delay of the vessel while the master is seeking another crew, an abandonment of the voyage, and, in some cases, the safety of the ship itself.

It is not our function to substitute our judgment for that of the employing agency or the Civil Service Commission. Our review is limited to the sole question of whether their action was reasonable in the light of all the evidence. *Blackmon* v. *United States*, 128 C. Cls. 288; *Bayly* v. *United States*, 99 C. Cls. 598. We have no doubt that it was entirely reasonable. Plaintiff, of course, acted in anger, but even after he had "slept over it," he still made no effort to rejoin his ship, but abandoned it and left it to get to Norfolk as best it could, without the services of one of the most important officers in charge of the operation of a ship, to wit, the First Assistant Engineer.

Plaintiff's motion is denied. Defendant's motion for summary judgment is granted, and plaintiff's petition is dismissed.

It is so ordered.

BARKSDALE, *District Judge*, sitting by designation; LARAMORE, *Judge*, and MADDEN, *Judge*, concur.

JONES, *Chief Judge*, dissenting:

I am unable to agree with the conclusion reached by the majority.

When the pleadings and attached exhibits are considered, the record wholly fails to justify the extreme penalty that was assessed against the plaintiff.

Concededly, plaintiff was not free from blame and should have been subjected to some sort of disciplinary measure but the record does not justify sustaining the charge of desertion and the forfeiture of all pay and privileges against a gallant sailor who had an unusually fine war

record. He had been given numerous medals and citations for outstanding combat duty during World War II. These included *inter alia*, a presidential unit citation, sub combat pin—7 stars, Navy unit citation, and a bronze star medal conferred by the President of the United States for courage and steadfast devotion in the fulfillment of several perilous missions.

Plaintiff, while in the employment of the Military Sea Transportation Service, Department of Navy, as first assistant engineer on the USNS Short Splice, was twice assaulted by one of the subordinates serving under him; the second time, while a third member of the crew was holding his arms. This latter assault caused rather serious injuries.

The first assault occurred while both parties were on leave; the second at about 1:00 a.m. while on the ship. At about 2:00 a.m. the same night plaintiff packed a bag and left the ship, staying at the Eagle's Nest Hotel. Plaintiff called the chief engineer at 2:30 a.m. to advise him that the Master wanted the ballast tanks filled the following morning. The morning following the incident, January 20, 1956, plaintiff went to the Bermuda Medical Center where he was referred to the Bermuda Hospital for treatment of his injuries.

By this time the ship had sailed. Plaintiff had left most of his clothing on board and his engineer's license was still in its place on the ship. Plaintiff caught a plane the same day for New York, the ship's home port, and immediately reported to the Military Sea Transportation Service, the agency which had employed him. He asked the privilege of rejoining the ship at Norfolk and was told that he would not be permitted to do so. Plaintiff was dismissed from the service on the ground of desertion, thus making a permanent black mark against his record.

I do not think the undisputed facts justify a verdict of desertion. In a recent decision by the Supreme Court,

Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474, 487 (1951), there is a holding to the effect that the fact that there is evidence, considered of and by itself, to support the administrative decision is not sufficient where there is opposing evidence so substantial in character as to detract from its weight and render it less than substantial on the record as a whole.

When this entire record is considered I do not believe, in the light of this interpretation, there is substantial evidence to justify the conclusion that was reached by the officials.

The charge of desertion is a very serious one. I am unable to escape the conclusion that the action was taken on sudden impulse with severe provocation. The fact that plaintiff left most of his clothing aboard ship and left his engineer's license in place on the ship does not comport with the idea of desertion.

It is true that plaintiff should not have left the ship. It is also true that a subordinate should not assault someone under whom he is serving. The latter action in the matter of discipline is more important than leaving the ship for just one night.

In order to remove the cloud from the name and reputation of a sailor with a magnificant war record, who had been covered with medals and citations, I would hold that there is not substantial evidence to sustain the finding of desertion and the forfeiture of all pay and allowances.

In order to balance the record and remove a manifest injustice, I would grant the plaintiff a restoration of his pay for a six months' period. This would have the effect of removing a blemish that in my judgment has unjustifiably been placed against a veteran with an outstanding war record.

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v.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-8a) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on February 3, 1960. The petition for a writ of certiorari was filed on May 2, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims should have dismissed petitioner's suit for back pay, addressed solely

to the merits of his discharge from federal employment, on the ground that the courts will review only assertions of procedural irregularity.

2. Whether, in any event, the Court of Claims properly dismissed petitioner's claim since there was substantial evidence in the administrative record to support his discharge from the Military Sea Transportation Service for cause on the ground of desertion.

STATUTE AND REGULATION

The pertinent part of 46 U.S.C. 701 and the applicable portion of the governing regulation, Civilian Marine Personnel Instruction No. 45, Sections 6-1 and 6-2 are set forth at pp. 2-3 of the petition.

STATEMENT

Petitioner, a veteran preference eligible, was employed by the Military Sea Transportation Service, Department of the Navy, as First Assistant Engineer on the USNS SHORT SPLICE (Pet. App. 2a). On February 3, 1956, he received written notice proposing his removal from the Service on the ground that on January 20, 1956, he had deserted his ship at the United States Naval Station, Bermuda. He was further advised that if the charge of desertion was sustained, he would forfeit all accumulated pay and allowances, annual leave, and any possessions left aboard the ship[1] (Defendant's Exhibit 2). Petitioner was given thirty days to answer the charge and the

[1] 46 U.S.C. 701 (Pet. 2), establishing, *inter alia*, the penalty of forfeiture for deserting seamen, is followed by provisions establishing the procedure of implementing the penal-

opportunity for an administrative hearing. After such a hearing was held on February 14, 1956, and on May 23, 1956, MSTS advised petitioner of its determination that he had deserted the ship and that he be removed from service for that reason, effective May 31, 1956 (Defendant's Exhibits 4, 5, 6, 27J, 27L).

The circumstances surrounding petitioner's departure from the vessel are set forth in the agency's findings (Defendant's Exhibit 27J) and in those of the court below on its independent review (Pet. App. 1a-6a). The departure stemmed from an altercation with a subordinate which took place in the Chief Petty Officers' Club at the Bermuda Naval Station (Pet. App. 2a). Petitioner followed the subordinate back to the vessel, attempted to resume the altercation, but was restrained by other officers and members of the crew (Pet. App. 2a). Both at the Club and in the melee aboard the vessel, petitioner was

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ty. 46 U.S.C. 702, *et seq.* Title 46, however, in terms, governs only "merchant seamen," and its provisions and procedures are not applicable to seamen employed by the Government. See, *e.g.*, *United States* v. *Sullivan*, 43 Fed. 602 (C.C. Ore.). The rule of forfeiture embodied in 46 U.S.C. 701 has been applied nonetheless by the Military Sea Transportation Service to Government seamen who desert, in view of 5 U.S.C. 1082(8), providing that the compensation of such seamen "shall be fixed * * * in accordance with prevailing rates and practices in the maritime industry." Thus, Civilian Marine Personnel Instruction No. 45 provides for the penalty of forfeiture for deserting Government seamen, in addition to removal from federal employment, and for the mode of withholding payment of wages, allowances, and leave.

struck by the subordinate several times (Pet. App. 2a).

Petitioner then determined to leave the vessel despite the advice of his friend, the Chief Mate, who cautioned against such action (Pet. App. 3a). After hours of discussion with the Chief Mate, petitioner borrowed a suitcase from him, packed most of his gear and left the vessel, proceeding to a nearby hotel (Pet. App. 3a). Upon obtaining a room, petitioner called the Chief Engineer of the SHORT SPLICE to inform him of certain necessary preparations for the vessel's sailing on the next morning. The Chief Engineer urged him "over and over again" to return to the ship, prior to its departure the next morning for Norfolk, but petitioner steadfastly refused, stating that he had already made a reservation on a flight back to New York (Pet. App. 4a). The vessel sailed the next morning, and petitioner subsequently took a plane to New York where he reported to MSTS headquarters (Pet. App. 4a).

On June 6, 1956, petitioner appealed from the MSTS decision to the Second United States Civil Service Region of the Civil Service Commission. Another hearing was held before the Commission and, based on its view of the evidence adduced at that hearing, the Commission, on September 12, 1956, rendered its decision that the agency had complied with all procedural requirements in petitioner's removal and that the determination of desertion was sustained by a preponderance of the evidence (Defendant's Exhibit 1). In this decision, the Commission carefully delineated the evidence and concluded

that petitioner had deliberately left the vessel, aware of the consequences of his action, and with the intention not to return. It found further that the evidence did not establish that petitioner was subjected to cruel treatment on the vessel, nor that he was in fear of his personal safety. Finally, it found that, "in the light of all the evidence," the fact that he had left certain personal items aboard the ship was "insufficient to defeat the charge of desertion" (Defendant's Exhibit 1).

On September 20, 1956, petitioner prosecuted an appeal from this decision to the Board of Appeals and Review of the Civil Service Commission (Defendant's Exhibits 24, 25). On January 18, 1957, the Board notified petitioner that it had affirmed the decision of the Regional Office on the ground that the charge of desertion was fully substantiated by the evidence (Defendant's Exhibit 26).

On September 30, 1958, petitioner brought suit for back pay in the Court of Claims (R. 1-4), alleging that the actions of MSTS and of the Civil Service Commission were arbitrary and capricious in that there was no substantial evidence in the administrative record to sustain the charge of desertion (R. 4; Pet. App. 2a). Petitioner made no complaint of procedural irregularity in the administrative action. On cross-motions for summary judgment, the Court of Claims undertook a thorough review of the evidence in the administrative record, including petitioner's purported excuses for his action (Pet. App. 1a-6a), and found that the Commission's determination of desertion was entirely reasonable and sup-

ported by substantial evidence (Pet. App. 6a). Accordingly, it granted the Government's motion for summary judgment (Pet. App. 6a).

ARGUMENT

Petitioner presents no question justifying review by this Court. As in his action in the Court of Claims, he makes no claim whatever of any procedural irregularity in the effectuation of his removal by MSTS. This being so, the Court of Claims should have dismissed his action without review of the evidence in the administrative record underlying the reason for removal. In any case, the decision reached by the court below on that review—that there is substantial evidence to support the administrative action—is clearly correct.

1. Petitioner's sole complaint here, as in the court below, is that the administrative determination of removal for desertion is not supported by substantial evidence. He asserts no ground of administrative procedural irregularity, nor could he, since he was afforded all the rights and protections accorded to an employee in his status. His attack, rather, goes to the merits of the basis for his removal, and, as such, is beyond the scope of judicial review. It is firmly established that the courts will review only alleged procedural irregularities in discharges from federal employment and will not look to the merits of such discharges. *E.g.*, *Eberlein* v. *United States*, 257 U.S. 82; *Keim* v. *United States*, 177 U.S. 290; *Keyton* v. *Anderson*, 229 F. 2d 519 (C.A. D.C.); *Carter* v. *Forrestal*, 175 F. 2d 364 (C.A. D.C.), cer-

tiori denied, 338 U.S. 832. Hence, the Court of Claims should have dismissed petitioner's action without reviewing the evidence underlying the reason for agency removal.

2. In any event, petitioner was accorded a complete review in the court below of his claim that the administrative determination of desertion is unsupported by substantial evidence. This claim is advanced by petitioner here, as in the court below, by unjustified reliance solely on his version of the events surrounding his departure from the SHORT SPLICE as it appears in his testimony and statements in the administrative record. Upon examination of the complete record, however, including the testimony and statements of the other witnesses to the events involved, the Court of Claims correctly concluded that there was ample evidence to sustain the finding of desertion and that the administrative determination was entirely reasonable. In reaching this conclusion, moreover, the Court of Claims carefully considered and properly disposed of each of the factors listed under Civilian Marine Personnel Instruction No. 45, which are raised by petitioner here as purportedly rebutting his intent to desert.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 900

CONSTANTINE GUINESS, *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITIONER'S REPLY BRIEF

The United States, in its Brief in opposition, put in issue the question of procedural irregularity. While it is true that petitioner raised only the issue of lack of substantial evidence to support the legal and factual conclusion of the charge of desertion, there are procedural irregularities which were raised at the administrative level.

Among others, the most important was the failure to allow in evidence the official log of the ship, despite petitioner's request that this be done.

The log would have established both the "sailing time" and "departure time" of the ship on the date petitioner was alleged to have deserted.

The court below in its opinion stated [Appendix p. 6 (a)]:

> "* * *, but even after he had 'slept over it,' he still made no effort to rejoin his ship, but abandoned it * * *."

While the ship "sailed" for New York at 10:00 A.M., this term refers to the time the ship departed the harbor limits and *not* the time it pulled away from the dock. Generally, this would be an hour or more earlier. Since petitioner awoke at 9:00 A.M., it would have been physically impossible to return to his ship.

CONCLUSION.

The petition should be granted.

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